Supreme Court, U.S.
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No. 00-271

IN THE

Supreme Court of the United States

GENERAL DYNAMICS CORPORATION,

Petitioner,

v.

PHILIP WILLIAMSON, ITZIK RIEF,
RONDA KIRLIN and THOMAS PAINTER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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30P

TABLE OF CONTENTS

Page

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

REASONS WHY THE PETITION SHOULD BE DENIED 7

A. Neither the Decision Below Nor the Record Raises the Questions Presented in the Petition 7

1. *The Ninth Circuit did not hold that threats of career harm may never constitute retaliation under the FLSA; it held that employees who have not engaged in any form of statutorily-defined protected activity may not prosecute a claim for retaliation under the FLSA* 7

2. *The language of section 215(a)(3) does not support GD's position that it committed actionable retaliation under the FLSA* 8

3. *Because the plaintiffs have no claim for FLSA retaliation, the maintenance of their state fraud claims could not possibly interfere with the intent of Congress* 14

B. Because There Is No Conflicting Authority and the Questions Presented Are Not Important Questions of Federal Law, No Reason Exists for the Grant of Certiorari 16

TABLE OF CONTENTS (Continued)

Page

1. *There is no conflicting authority* 16

   a. No published federal or state decision holds that employees who have not engaged in statutorily-protected activity may bring an action for retaliation under section 215(a)(3) 16

   b. No published federal or state decision, applying doctrinal preemption analysis, holds that section 215(a)(3) preempts a common-law fraud claim 18

2. *The question whether the FLSA preempts a state fraud claim has not arisen in the 62-year history of the FLSA* 19

C. It Is Unnecessary To Decide in This Case Whether a Victim of Retaliation May Recover Punitive Damages 19

CONCLUSION 25

APPENDIX

Relevant portions of sections 215 and 216 of the Fair Labor Standards Act, 29 U.S.C. §§ 215-216 (1938) A-1

TABLE OF AUTHORITIES

Page

CASES

Ball v. Memphis Bar-B-Q Co., Inc.,
34 F.Supp.2d 342 (E.D. Va. 1999) 12-14

Boardman v. Estelle
957 F.2d 1523 (9th Cir. 1992) 9

Bolick v. Brevard County Sheriff's Dep't
937 F.Supp 1560 (M.D. Fla. 1996) 20

Canfield v. United States
14 Cl.Ct. 687 (Cl.Ct. 1988) 10

Contreras v. Corinthian Vigor Ins. Brokerage, Inc.
25 F.Supp.2d 1053 (N.D.Cal. 1998) 19-20

Cross v. Bally's Health & Tennis Corp.
945 F.Supp. 883 (D. Md. 1996) 9, 11

Delta Air Lines, Inc. v. August
450 U.S. 346 (1981) 10

English v. General Elec. Co.
496 U.S. 72 (1990) 4-5

Helvering v. Stockholms Enskilda Bank
293 U.S. 84 (1934) 23

TABLE OF AUTHORITIES (Continued)

Page

Hillsborough County v. Automated Medical Laboratories, Inc.
471 U.S. 707 (1985) 5

Hines v. Davidowitz
312 U.S. 52 (1941) 5

Kruse v. Bank of America
202 Cal.App.3d 38 (1988) 22

Kuhn v. Philadelphia Elec. Co.
475 F.Supp. 324 (E.D. Pa. 1979) 10

Lambert v. Ackerley
180 F.3d 997 (9th Cir. 1999) 8

Legutko v. *Local 816, Int'l Bhd. of Teamsters*
606 F.Supp. 352 (E.D.N.Y. 1985) 18

Lerwill v. Inflight Motion Pictures, Inc.
343 F.Supp. 1027 (N.D. Cal. 1972) 3

Martin v. American Int'l Knitters Corp.
Civ. A. No. 91-0027, 1992 WL 108832
(N. Mariana Islands 1992) 20

McCray v. New York
461 U.S. 961 (1983) 24

TABLE OF AUTHORITIES (Continued)

Page

O'Brien v. Dekalb–Clinton Counties Ambulance Dist.
No. 94-6121-CV-SJ-6, 1996 WL 565817
(W.D. Mo. 1996) 20

Partenweederei, MS Belgrano v. Weigel
313 F.2d 423 (9th Cir. 1962) 9

Perez v. Z Frank Oldsmobile, Inc.
Nos. 99-2742, 00-1786, 99-2854, 00-1701,
2000 WL 1049185 (7th Cir. 2000) 22

Pommier v. James L. Edelstein Enters.
816 F.Supp. 476 (N.D. Ill. 1993) 20

Raya-Ledesma v. INS
55 F.3d 418 (9th Cir. 1995) 9

Rice v. Sioux City Memorial Park Cemetery
349 U.S. 70 (1955) 19

Sena v. General Dynamics Corp.
No. 91-00965-B (AJB) (S.D. Cal.) 1-2, 6, 10

Shea v. Galaxie Lumber & Constr. Co., Ltd.
152 F.3d 729 (7th Cir. 1998) 19

Silkwood v. Kerr-McGee Corp.
464 U.S. 238 (1984) 5

TABLE OF AUTHORITIES (Continued)

Page

Snapp v. Unlimited Concepts, Inc.
208 F.3d 928 (11th Cir. 2000) 6, 21-22, 24

Soler v. G & U, Inc.
690 F.2d 301 (2d Cir. 1982) 3, 16-18

Soto v. Adams Elevator Equip. Co.
941 F.2d 543 (7th Cir. 1991) 19

Strickland v. MICA Information Sys.
800 F.Supp. 1320 (M.D.N.C. 1992) 9, 11

Travis v. Gary Community Mental Health Ctr., Inc.
921 F.2d 108 (9th Cir. 1990) 6, 19, 21-22, 24

Wertheim v. State of Arizona
No. CIV 92-453 PHX RCB, 1993 WL 603552
(D. Ariz. Sept. 30, 1993) 10

Youakim v. Miller
425 U.S. 231 (1976) 11

STATUTES

Cal. Code Civ. Proc., § 1021 22

29 U.S.C. § 207(a)(1) 18

29 U.S.C. § 215 1

TABLE OF AUTHORITIES (Continued)

Page

29 U.S.C. § 215(a)(3) 2-3, 5-6, 8-18, 21, 23

29 U.S.C. § 216 1

29 U.S.C. § 216(a) 23-24

29 U.S.C. § 216(b) 10, 19, 24

29 U.S.C. § 256(b) 10

RULES

FED. R. APP. P. 35(a)(2) 19

FED. R. CIV. P. 12(b)(6) 1-2, 10

Supreme Court Rule 10 16

OTHER AUTHORITIES

Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230 (1983) 24

Goelz & Watts, Rutter Group Practice Guide: Federal Ninth Circuit Civil Appellate Practice (The Rutter Group 2000) ¶ 11.35, p. 11-4 9-10

2A Singer, Statutes and Statutory Construction (6th ed. 2000) § 47.22, pp. 297-304 23

The respondents, Philip Williamson, Itzik Rief, Ronda Kirlin, and Thomas Painter ("plaintiffs"), respectfully request that the petition for writ of certiorari filed by petitioner General Dynamics Corporation ("GD") be denied.

STATUTORY PROVISIONS INVOLVED

Relevant portions of sections 215 and 216 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C., §§ 215-216 (1938), are reproduced in Appendix A.

STATEMENT OF THE CASE

This is a pleading case. The appeal arises from a district court order dismissing a state law fraud action with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Pet., App. B. The Ninth Circuit reversed and remanded the case for trial. Pet., App. A, p. 31a.

The plaintiffs were employees of the Convair Division of GD who had worked overtime for which they had not been compensated. In the fall of 1993, they were eligible to participate in a negotiated settlement of an FLSA class action entitled, *Sena v. General Dynamics Corp.*, No. 91-0965-B (AJB) (S.D. Cal.) ("*Sena*").

At that time, unbeknownst to the plaintiffs, GD planned to close the Convair plant and to eliminate their jobs. However, GD was economically motivated to reduce its liability in *Sena* by discouraging employees from opting in and participating in the settlement of that case. Placing corporate profits above its ethical obligation to employees whose jobs were soon to be eliminated, it falsely represented to the plaintiffs and other employees that (1) they had promising job and career opportunities at Convair and (2) those opportunities would be harmed by opting into *Sena*. In reliance upon those false representa-

tions, and preferring secure, long-term employment to participation in the *Sena* settlement, the plaintiffs chose not to opt into *Sena*.

Significantly, at the time GD made its false representations, the plaintiffs had not engaged in any employee activity protected by the anti-retaliation provision of the FLSA (29 U.S.C. § 215(a)(3)) ("section 215(a)(3)"); App. A, p. A-1). Pet., App. A, pp. 15a-17a. Specifically, they had not "filed any complaint or instituted or caused to be instituted any proceeding" under the FLSA; they had not "testified" nor were they "about to testify in any such proceeding"; and they had not "served" nor were they "about to serve on an industry committee." 29 U.S.C. § 215(a)(3).

The gravamen of the plaintiffs' fraud claim is not that GD violated the FLSA by failing to pay overtime wages, by retaliating against them, or otherwise. The gravamen of their claim is that they detrimentally relied on GD's false representations regarding their career opportunities. They were induced by deceit to forfeit their contractual rights, as potential members of the *Sena* class and as third party beneficiaries of the *Sena* settlement agreement, to receive monetary settlement payments from GD.

The plaintiffs sued GD solely for common law fraud under state law. Pet., App. B, pp. 32a-34a. GD moved for dismissal of those claims pursuant to Federal Rule of Civil Procedure section 12(b)(6), arguing essentially that: (1) the fraudulent threats of career harm alleged by the plaintiffs constituted unlawful retaliation under the FLSA (29 U.S.C. § 215(a)(3)), and (2) even though the plaintiffs had not alleged FLSA retaliation claims (and could not do so because any such claims were time-barred), the plaintiffs' state law fraud claims were preempted by federal law, because (a) the federal remedies

for conduct prohibited by the FLSA are limited and exclusive and (b) the prosecution of claims for broader fraud remedies under state common law would interfere with the intent of Congress in adopting section 215(a)(3). Relying on cases cited by GD which did not even involve the constitutional doctrine of federal preemption,[1] the district court agreed that the plaintiffs had unpleaded, time-barred, retaliation claims under section 215(a)(3), and their state law claims for fraud were therefore preempted by the FLSA. Pet., App. B, pp. 36a-38a.[2]

On the plaintiffs' appeal, the Ninth Circuit held in relevant part that (1) the plaintiffs never had a valid claim for FLSA retaliation because they had not engaged in any activity protected by section 215(a)(3) at the time of GD's fraud (Pet., App. A, pp. 15a-17a) and, therefore, (2) "there is no conflict preemption because the anti-retaliation does not apply" (Pet., App. A, pp. 7a-25a, 20a). Accordingly, the court reversed the district court's order of dismissal and remanded the case for trial. *Id.*, p. 31a.

As the Ninth Circuit correctly observed, the essence of the plaintiffs' claim is garden-variety fraud, not FLSA retaliation:

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[1] *Lerwill v. Inflight Motion Pictures, Inc.*, 343 F.Supp. 1027 (N.D. Cal. 1972); *Soler v. G & U, Inc.*, 690 F.2d 301 (2d Cir. 1982). As the Ninth Circuit explained, *Lerwill* "never mentions the word 'preemption,' and it does not rely on a preemption framework." Pet., App. A, p. 19a. Neither does *Soler*.

[2] The district court dismissed the action with prejudice and did not afford the plaintiffs even a single opportunity to allege a claim for retaliation under the FLSA, which the court had ruled was preemptive of state law. *Id*, p. 38a.

> there is a simpler way to look at the preemption issues in this case. The [plaintiffs'] career fraud claims are nothing more than fraud claims about a plant closing. . . . This case is about whether GD is guilty of fraud and misrepresentation because of its statements about the [plaintiffs'] "career jobs" and about not closing the Convair Division. The *Sena* settlement of the FLSA claims was merely an impetus for this alleged fraud . . . . Pet., App. A, pp. 24a-25a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The primary question presented is whether the plaintiffs' state law fraud claims are preempted by the FLSA.[3] GD has no quarrel with the Ninth Circuit's holding that there is neither *express* preemption of state law by the FLSA nor *field* preemption of state wage and hour law, much less state tort law, by the FLSA. Pet., App. A, pp. 14a-15a, 20a. It contends that the plaintiffs' claims are preempted under the doctrine of *obstacle* preemption, a disfavored subspecies of *conflict* preemption.[4]

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[3]Federal preemption of state law can occur in three circumstances: (1) where Congress expressly specifies that its enactment preempts state law (*express* preemption); (2) where there is a scheme of federal regulation so pervasive that there is a reasonable inference that Congress intended to dominate the field, and state laws on the same subject are precluded (*field* preemption); and (3) where federal law actually conflicts with state law (*conflict* preemption). *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990); Pet., App. A, p. 8a.

[4]This Court has found *conflict* preemption in two types of situations: (1) "where it is impossible for a private party to comply with both state and federal requirements" (*actual* conflict preemption) or (2) where state law "stands as an obstacle to the accomplishment and execution

Essentially, GD argues that the prosecution of the plaintiffs' state law fraud claims would interfere with the intent of Congress because the federal procedural and substantive remedies for FLSA retaliation are more limited than the state procedural and substantive remedies for fraud. Pet. pp. 19-27. Such argument, which *assumes* that the plaintiffs possessed valid claims for retaliation under section 215(a)(3) of the FLSA, begs the critical legal question decided adversely to GD by the Ninth Circuit. The Ninth Circuit held that GD's alleged conduct did *not* constitute actionable retaliation under the FLSA. Pet., App. A, pp. 15a-17a, 20a. Because the plaintiffs possessed no actionable claim for retaliation, the intent of Congress in enacting section 215(a)(3) is not even implicated, much less impeded, by the prosecution of the plaintiffs' state law fraud claims. Neither the record nor the opinion of the Ninth Circuit present the preemption questions raised in GD's petition.

The Ninth Circuit correctly determined that GD's fraudulent conduct did not constitute actionable retaliation under the FLSA. The plaintiffs did not allege, nor could they have alleged, that they had engaged in any activity protected by

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of the full purposes and objectives of Congress" (*obstacle* preemption). *English v. General Elec. Co.*, *supra*, 496 U.S. at p. 79, quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

The Court "has observed repeatedly that pre-emption is ordinarily not to be implied absent an 'actual conflict.'" *English* v. *General Elec. Co.*, *supra*, 496 U.S. at p. 90. "'Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. . . . Instead, [courts] must look for special features warranting pre-emption.'" *Id.* at p. 87, quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985).

section 215(a)(3) before GD made false threats that their careers would be harmed if they asserted their FLSA rights by opting into *Sena*. Pet., App. A, pp. 15a-17a.

Furthermore, because fraud and retaliation are fundamentally different wrongs, and because the damage remedies for FLSA retaliation are actually broader than the damage remedies for fraud under state law, the prosecution of the plaintiffs' fraud claims could not possibly interfere with the intent of Congress in enacting section 215(a)(3).

This case involves neither a conflict among circuits nor an important question of federal law. In the 62-year history of the FLSA, no court, applying doctrinal preemption analysis, has ever held that a state law fraud claim is preempted by that Act. No court has ever adopted the interpretation of section 215(a)(3) which is the unstated foundation for GD's arguments, *viz.*, that, even when employees have not previously engaged in activity protected by the statute, an employer commits actionable retaliation whenever it engages in conduct inimical to the assertion of FLSA rights. Such an interpretation strains the language of section 215(a)(3) to the breaking point.

Finally, because the plaintiffs have not alleged a claim for FLSA retaliation and could not do so, it is unnecessary in this case to resolve a conflict between two circuits regarding whether a victim of such retaliation may recover punitive damages. *Compare Travis v. Gary Community Mental Health Ctr., Inc.*, 921 F.2d 108, 111-112 (9th Cir. 1990), *cert. denied*, 502 U.S. 812 (1991), *with Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 933-939 (11th Cir. 2000).

REASONS WHY THE PETITION SHOULD BE DENIED

A. Neither the Decision Below Nor the Record Raises the Questions Presented in the Petition.

1. *The Ninth Circuit did not hold that threats of career harm may never constitute retaliation under the FLSA; it held that employees who have not engaged in any form of statutorily-defined protected activity may not prosecute a claim for retaliation under the FLSA.*

The questions presented are premised upon a serious distortion of the Ninth Circuit's opinion. GD erroneously argues the Ninth Circuit held that an employer's "threats of future economic retaliation are not covered by the FLSA." Pet. pp. 9, 12-19. That is not what the court held. The Ninth Circuit held that the plaintiffs had no actionable retaliation claim because *they had not engaged in any statutorily-protected activity at the time that GD threatened harm to their careers.*

Specifically, the Ninth Circuit reasoned and held:

> In this case, the [plaintiffs] never filed a complaint with an agency or the courts. They never complained to their supervisors of a FLSA violation or notified the Department of Labor. They never instituted or caused to be instituted any proceedings because they were not parties to the class-action litigation in *Sena*. They were invited to opt-into that lawsuit, but relied on GD's allegedly fraudulent assertions that they held career jobs and that the Convair

> Division would remain open. The [plaintiffs] argue the fraud occurred after the failure to pay overtime and after *Sena* settled the FLSA claims. Thus, even under *Lambert*[5] GD's allegedly fraudulent conduct would not be actionable under the anti-retaliation provision. Pet., App. A, pp. 16a-17a.

The dispositive issue was the lack of prior protected employee activity, not the lack of employer conduct that might constitute unlawful, retaliatory "discrimination" under section 215(a)(3).

2. *The language of section 215(a)(3) does not support GD's position that it committed actionable retaliation under the FLSA.*

Section 215(a)(3) of Title 29 makes it unlawful for any person:

> to discharge or in any other manner discriminate against any employee *because* such employee has [1] filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or [2] has testified or is about to testify in any such proceeding, or [3] has served or is about to serve on an industry

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[5]In *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 936 (2000), the Ninth Circuit, sitting en banc,

> "held that the FLSA's anti-retaliation provision protects not only employees who have filed complaints in court or with an agency such as the Department of Labor but also employees who have complained to their employers." Pet., App. A, p. 12a.

committee . . . . (Italics added.)

In order to establish a prima facie case of retaliation under the FLSA, the plaintiff must establish that: (1) he or she engaged in certain protected activity of which the employer was aware; (2) the employer took proscribed adverse employment action against the plaintiff; and (3) the two elements are related causally. *Cross v. Bally's Health & Tennis Corp.*, 945 F.Supp. 883, 888 (D. Md. 1996); *Strickland v. MICA Information Sys.*, 800 F.Supp. 1320, 1323 (M.D.N.C. 1992).

The Ninth Circuit correctly determined that the plaintiffs had not alleged they had engaged in any protected employee activity before GD made its false representations, and for that reason they had no actionable claim for retaliation. Pet., App. A, pp. 15a-17a.

In its petition, GD argues that the plaintiffs were protected by section 215(a)(3) because they were "about to testify" in *Sena* by submitting claim forms under oath. Pet. p. 18. For numerous reasons, that claim of protected employee activity is mistaken.

First, that contention was not expressly considered by the Ninth Circuit because it was raised for the first time in GD's petition for rehearing and petition for rehearing en banc. Circuit courts ordinarily do not consider issues raised in such an untimely manner[6]; and "[o]rdinarily, this Court does not decide

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[6]In the Ninth Circuit, parties generally may not assert new issues or arguments in a petition for rehearing. *Raya-Ledesma v. INS*, 55 F.3d 418, 420, n.1 (9th Cir. 1995); *Boardman v. Estelle*, 957 F.2d 1523, 1535 (9th Cir. 1992), *cert. denied*, 506 U.S. 904; *Partenweederei, MS Belgrano v. Weigel*, 313 F.2d 423, 424-425 (9th Cir. 1962), *cert. denied*, 373 U.S. 904 (1963) (explaining the sound policy supporting the general rule); Goelz

questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

Second, the plaintiffs did not allege that they were "about to testify" (29 U.S.C. § 215(a)(3)) in their first amended complaint. CR 23, 1 ER 146-164. Because GD's contention is premised on a fact beyond the operative pleading, such a contention cannot provide a basis to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Third, the plaintiffs were not required to submit a claim form under oath in order to opt into *Sena*. Neither 29 U.S.C. § 216(b) nor 29 U.S.C. § 256(b) requires that a consent to join an FLSA class action be under oath. Each statute merely requires a plaintiff's written consent. Courts have held that such consent may not even require the plaintiff's signature (*Wertheim v. State of Arizona*, No. CIV 92-453 PHX RCB, 1993 WL 603552, at *8 (D. Ariz. Sept. 30, 1993) ("the court notes that section 256(b) does not require persons wishing to opt in to submit signed consent forms"); *Canfield v. United States*, 14 Cl.Ct. 687, 688, 692 (Cl.Ct. 1988)) and does not require notarization (*Kuhn v. Philadelphia Elec. Co.*, 475 F.Supp. 324, 327 (E.D. Pa. 1979)). GD has failed to cite any case holding that such consent must be filed under oath.

Fourth, GD's interpretation of the phrase "about to testify" in section 215(a)(3) is legally erroneous. In GD's view, any employee who is *capable* of giving testimony in support of his or her own unasserted overtime claim is "about to testify"

& Watts, Rutter Group Practice Guide: Federal Ninth Circuit Civil Appellate Practice (The Rutter Group 2000) ¶ 11.35, p. 11-4.

and is therefore protected by the anti-retaliation provision, even if (1) the employee has never asserted his or her FLSA rights, formally or informally, and (2) the employer is unaware whether the employee has any intention to testify. In GD's view, all employees with meritorious overtime claims are protected by the anti-retaliation provision. The argument, which would greatly expand employer liability, contradicts the language of section 215(a)(3).

The statute is not nearly so broad. Section 215(a)(3) prohibits employers from discharging or otherwise discriminating against an employee "because" the employee "is about to testify." For such a *causal* relationship to exist, an employer must at least be *aware* of an employee's existing intention to testify. *Strickland v. MICA Information Sys., supra*, 800 F.Supp. at p. 1323; *see Cross v. Bally's Health & Tennis Corp., supra*, 945 F.Supp. at p. 888. The apparent purpose of Congress in enacting the "about to testify" language was to prevent employer retaliation against an employee who (1) had manifested his or her intention to give testimony adverse to the employer or at least (2) had been subpoenaed or scheduled to testify. It was not the apparent purpose of Congress to cloak all employees who might seek to establish their FLSA rights by means of future testimony with the protection of section 215(a)(3). If the intent of Congress were so broad, the first clause of the statute, which protects an employee who has "filed any complaint or instituted or caused to be instituted any proceeding," would be superfluous, for any such employee would also be "about to testify."

Even assuming for the sake of argument only that submitting an FLSA class action settlement claim form under oath constitutes "testify[ing]" for the purpose of the anti-retaliation statute, the plaintiffs never alleged that GD was aware of their intention to submit such a form. Without such

employer awareness, the plaintiffs could not allege or prove that they had been threatened "because" they were "about to testify"; they could not state a retaliation claim under section 215(a)(3).

In *Ball v. Memphis Bar-B-Q Co., Inc.*, 34 F.Supp.2d 342 (E.D. Va. 1999), the district court was required to consider the sufficiency of a retaliation claim based upon the "about to testify" clause in section 215(a)(3). During the course of the plaintiff's employment, he learned that a coworker was preparing to bring an FLSA action against the defendant employer because the employer, to avoid paying overtime, had turned back the clock on the computerized timekeeping system that tracked hours worked. *Id.* at p. 343. The plaintiff, Ball, informed the employer's president, Sorin, about the situation. *Ibid.* Sorin met with Ball and suggested a certain set of facts for Ball to testify to if the FLSA action were filed. *Ibid.* Ball disagreed with those facts and refused to testify as Sorin desired. *Ibid.* Five days later Ball was fired because he would not agree to testify as his employer wanted. *Ibid.*

The district court dismissed Ball's complaint for failure to state a claim, holding that the FLSA's anti-retaliation clause did not apply. Interpreting the phrase "has testified or is about to testify in any such proceeding" (29 U.S.C. § 215(a)(3)), the court held that "an individual can only receive the benefit" of the quoted language "when [he or] she has testified in an FLSA proceeding or is *scheduled to testify* in a then-pending proceeding." *Id.* at p. 345 (italics added). Explaining the key word, "about," the court stated:

> "About" refers to something that, while not necessarily imminent, is at least *relatively certain* and near in time. See Black's Law Dictionary 7 (5th ed. 1979) (defining "about" as

> "near in time, quantity, number, quality, or degree. Substantially, approximately, almost, or nearly"). *Ibid.* (italics added).

Thus, "about to testify," as used in section 215(a)(3), means the employer is aware that it is "relatively certain" that the employee will testify; it does not mean that the employer is aware that the employee is "capable of giving testimony." Accordingly, the court deciding *Ball* reasoned, in part,[7] that the plaintiff

> ha[d] failed to allege that he was "about" to testify. The Complaint state[d] only that he informed Sorin "about how he would testify if he were deposed as part of a lawsuit." . . . *The Complaint fail[ed] to allege that plaintiff was subpoenaed to testify or even that he was told he would be called upon to testify*, much less any statement as to when such testimony might occur. *Ibid.* (italics added).

Here, as in *Ball*, the plaintiffs were never "scheduled to testify," "subpoenaed to testify," or even "told [they] would be called upon to testify." *Ibid.* The mere fact that they were *capable* of testifying in *Sena* does not establish that they were "about to testify" for the purpose of alleging a viable claim for retaliation under section 215(a)(3).

In *Ball*, the employee could not state a claim even though the employer's president knew that he had refused to

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[7]The district court also held that "[a] lawsuit that is merely threatened or inchoate simply has not ripened into a proceeding to which the second clause of § 215(a)(3) would apply." *Id.* at pp. 345-346.

give testimony favorable to the employer and would be an adverse witness *if* he ever testified. If the plaintiff in *Ball* could not state a retaliation claim on the ground he was discharged "because" he was "about to testify" (29 U.S.C. § 215(a)(3)), then the plaintiffs in this case could not state a retaliation claim on the ground they were threatened "because" they were "about to testify."

GD has not cited the circuit court opinion, the record, its appellate brief, or any legal authority in support of its argument that section 215(a)(3) applied to the plaintiffs because they were "about to testify." Pet p. 18. For any number of reasons, such an argument is meritless.

In short, the plaintiffs, who engaged in no employee activity protected by section 215(a)(3), could not possibly have been the victims of unlawful "retaliation." Such retaliation is defined as specified, employer conduct—"discharge" or "discrimination"—which is a *causally-related*, employer response to prior, specified, employee activity. By enacting section 215(a)(3), Congress prohibited employers from retaliating against employees who had asserted, or were about to assert, FLSA rights by filing a complaint, instituting a proceeding, testifying, or serving on an industry committee. It did not prohibit all employer conduct inimical to the assertion of FLSA rights. The statute cannot possibly be interpreted so broadly, and no court has ever done so.

3. *Because the plaintiffs have no claim for FLSA retaliation, the maintenance of their state fraud claims could not possibly interfere with the intent of Congress.*

The Ninth Circuit correctly held the plaintiffs can state a state law claim for fraud but cannot state an actionable claim

for FLSA retaliation. That being so, GD's contrived claim of *obstacle* preemption is without any merit. The FLSA does not permit, prohibit, or even mention employer fraud. The intent of Congress in enacting section 215(a)(3) is not even implicated, much less impeded or impaired, by the prosecution of the plaintiffs' state law fraud claims.

B. Because There Is No Conflicting Authority and the Questions Presented Are Not Important Questions of Federal Law, No Reason Exists for the Grant of Certiorari.

In relevant part, Supreme Court Rule 10 authorizes review of a circuit court decision that (1) conflicts with another circuit court decision "on the same important matter"; (2) decides "an important federal question" in a way that conflicts with a decision of a state court of last resort; (3) in some other way calls for the exercise of this Court's supervisory power, or (4) presents "an important question of federal law" that has not been, but should be, decided by this Court or has been decided "in a way that conflicts with relevant decisions of this Court." This case meets none of those criteria.

1. *There is no conflicting authority.*

a. No published federal or state decision holds that employees who have not engaged in statutorily-protected activity may bring an action for retaliation under section 215(a)(3).

GD has not cited any federal or state decision holding that an employer's threat of career harm that is made before any employee activity protected by section 215(a)(3) constitutes actionable retaliation. The Ninth Circuit's holding that it does not is the only conclusion that may be drawn from the language of the statute.

GD argues that the Ninth Circuit's holding that an employer's "threats of future economic retaliation are not covered by the FLSA" (Pet. pp. 9, 12-19) conflicts with the decision of the Second Circuit in *Soler v. G & U, Inc.*, *supra*,

690 F.2d 301, 302-303 (2d Cir. 1982). Pet. pp. 17-18. However, as explained above, the Ninth Circuit did not hold that threats of future economic retaliation are never actionable under section 215(a)(3), and its holding that employees who have not engaged in any statutorily-protected activity may not assert a claim for retaliation is not inconsistent with *Soler*.

The facts of *Soler* are readily distinguishable from the facts of this case. In *Soler*, migrant farm-workers brought an action under the FLSA to recover wage deductions for housing in labor camps. 690 F.2d at p. 302. That action—the filing of a formal complaint—constituted employee activity protected by section 215(a)(3). They amended their complaint to allege retaliatory discrimination in violation of section 215(a)(3), claiming that the defendant had coerced several plaintiffs to withdraw from the lawsuit by means of threats. *Ibid.* When they sought a preliminary injunction prohibiting such conduct, the district court denied the injunction on the grounds that (1) "[n]one of the farmworkers experienced or were threatened with any adverse change in employment," i.e., as a matter of fact there had been no threats by the employer, and (2) no irreparable harm in the absence of an injunction had been shown. *Ibid.* Finding that "the district court did not abuse its discretion in concluding that plaintiffs were unlikely to succeed on the merits of their claim under section 215(a)(3), and that no irreparable harm would result from denial of the preliminary injunction," the Second Circuit affirmed. *Id.* at pp. 302-303.

In that procedural context, the court stated, "[u]ndoubtedly, threats of retaliation are also prohibited by [section 215(a)(3)], as are efforts to obtain withdrawal of FLSA claims by threats of retaliation. Cf. EEOC v. Kenosha Unified School District No. 1, 620 F.2d 1220, 1228 (7th Cir. 1980) (finding no threat of retaliation)." *Id.* at pp. 302-303. However, for several reasons, that statement does not conflict with the holding of the

Ninth Circuit in this case. *First*, since the district court found that no employment threats had in fact been made, the Second Circuit's statement is dictum. *Second*, and more importantly, since the *Soler* plaintiffs had already filed an action under the FLSA when the alleged threats were made, the Second Circuit could only have been referring to threats of retaliation made by an employer *after* the filing of formal FLSA claims, i.e., after employee activity protected by section 215(a)(3). In this case, GD cannot identify any allegation of protected employee activity which triggered the applicability of the anti-retaliation statute.[8]

b. No published federal or state decision, applying doctrinal preemption analysis, holds that section 215(a)(3) preempts a common-law fraud claim.

No published federal or state decision, applying doctrinal preemption analysis, holds that section 215(a)(3), or any other provision of the FLSA, preempts a common-law fraud claim.

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[8]In *Legutko* v. *Local 816, Int'l Bhd. of Teamsters*, 606 F.Supp. 352, 358-359 (E.D.N.Y. 1985), which is also cited by GD (Pet. p. 18), a district court judge held that an employee's circulation of a petition requesting a union to prevent a perceived violation of the FLSA's overtime provision (29 U.S.C. § 207(a)(1)) was a protected activity under section 215(a)(3), even though the employee had not filed any formal complaint or instituted any formal proceeding. The court further held that the employee's allegation that his employer threatened to discharge him for such activity stated an anti-retaliation claim for which limited relief might be granted, even though the employer had not, in fact, discharged the employee. As in *Soler*, the employer threat occurred only *after* the employee had engaged in statutorily-protected activity involving the assertion of FLSA rights.

2. *The question whether the FLSA preempts a state fraud claim has not arisen in the 62-year history of the FLSA.*

The Ninth Circuit recognized that the issue "whether the FLSA preempts a common-law fraud claim" was "an issue of first impression." Pet., App. A, p. 7a. However, there is a spacious difference between novelty and importance. The issue presented must be "beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

The FLSA was enacted in 1938. If the issue whether that Act preempts a common-law fraud claim has not previously arisen in 62 years, the issue is simply not an important, recurrent federal question that warrants the attention of this Court.

Circuit courts may sit en banc to resolve "a question of exceptional importance." FED. R. APP. P. 35(a)(2). When GD petitioned for rehearing en banc, no active judge of the Ninth Circuit even "requested a vote on whether to rehear the matter en banc." Pet., App. C, p. 39a.

C. It Is Unnecessary To Decide in This Case Whether a Victim of Retaliation May Recover Punitive Damages.

In *Travis v. Gary Community Mental Health Ctr., Inc.*, *supra*, 921 F.2d 108, 111-112 (7th Cir. 1990) ("*Travis*"), the Seventh Circuit held that the remedies available for retaliation under section 216(b) of the FLSA, as amended in 1977, include punitive damages. For ten years, no other circuit disagreed and *Travis* was followed almost uniformly. *See, e.g., Shea v. Galaxie Lumber & Constr. Co., Ltd.*, 152 F.3d 729, 734-736 (7th Cir. 1998); *Soto v. Adams Elevator Equip. Co.*, 941 F.2d

543, 551-552 (7th Cir. 1991); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F.Supp.2d 1053, 1059-1060 (N.D.Cal. 1998) (denying motion to strike claim for punitive damages in FLSA retaliation action); *O'Brien v. Dekalb–Clinton Counties Ambulance Dist.*, No. 94-6121-CV-SJ-6, 1996 WL 565817, at *6 (W.D. Mo. 1996); *Pommier v. James L. Edelstein Enters.*, 816 F.Supp. 476, 483 (N.D. Ill. 1993); *Martin v. American Int'l Knitters Corp.*, Civ. A. No. 91-0027, 1992 WL 108832, at *2 (N. Mariana Islands 1992) (denying motion to strike claim for punitive damages in FLSA retaliation action brought by the Secretary of Labor); *but see Bolick v. Brevard County Sheriff's Dep't*, 937 F.Supp 1560, 1566-1567 (M.D. Fla. 1996).

The Ninth Circuit observed in this case:

> . . . GD's allegedly fraudulent conduct was not covered by a FLSA provision. Nor are the [plaintiffs] in this case avoiding the FLSA in order to seek a more favorable remedy. The FLSA's anti-retaliation provision actually offers *broader* remedies than state fraud claims because the anti-retaliation provision allows the recovery of attorneys' fees. The other remedies are the same. In 1977, Congress amended section 216(b) to allow plaintiffs who prove retaliation under section 215(a)(3) to obtain "legal and equitable relief" under state law. At least one other circuit has interpreted this relief to include compensatory, punitive, and emotional distress damages. *See, e.g., Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 284 (7th Cir. 1993); *Travis v. Gary Community Mental Health Ctr., Inc.*, 921 F.2d 108, 111 (7th Cir. 1990). Pet., App. A, pp. 19a-20a (footnote omitted, italics added).

However, one week before the Ninth Circuit filed its opinion, the Eleventh Circuit held in *Snapp v. Unlimited Concepts, Inc.*, *supra*, 208 F.3d 928, 933 (11th Cir. 2000) ("*Snapp*"), that punitive damages are not recoverable for retaliation. GD did not cite *Snapp* in its petition for rehearing and rehearing en banc, and, from all that appears, the Ninth Circuit was unaware of that case and did not have the opportunity to compare the reasoning of *Travis* and *Snapp*.

For numerous reasons, this case is not an appropriate vehicle to resolve the conflict between *Travis* and *Snapp*.

First, because the plaintiffs have not even alleged a claim for FLSA retaliation in this case, and could not do so, the issue whether a victim of retaliation may recover punitive damages is tangential at best.

Second, the Ninth Circuit's observation that *Travis* permits the recovery of punitive damages for retaliation is dictum that is not essential to its judgment. The Ninth Circuit's primary holding was that employees who have not engaged in activity protected by section 215(a)(3) may not state a claim for retaliation (Pet., App. A, pp. 15a-17a); consequently, there is "no conflict preemption because the anti-retaliation provision does not apply" (*id.*, p. 20a). If the plaintiffs have no federal retaliation claim, their common-law fraud claim does not even implicate, much less impede, the intent of Congress in adopting section 215(a)(3). *Travis* was cited in support of the court's alternative and nonessential reasoning that the plaintiffs were not "avoiding the FLSA in order to seek a more favorable remedy." Pet., App. A, pp. 19a-20a. If the remedies for FLSA retaliation are actually "broader" (Pet., App. A, p. 19a) than the

remedies for common-law fraud,[9] as they are, even if the plaintiffs possessed an actionable retaliation claim, the prosecution of the plaintiffs' state law fraud claims could not possibly interfere with the intent of Congress, as GD contends.

Third, though the conflict between *Travis* and *Snapp* is real, it is a very immature conflict that may well be resolved through further examination of the issue by other circuit courts. It took 23 years—from the time section 216(b) was amended in 1977 to the present—for this conflict even to materialize. Neither the Court of Appeals for the Seventh Circuit, which decided *Travis*, nor any other circuit court has critically examined the contrary reasoning of *Snapp*. *See Perez v. Z Frank Oldsmobile, Inc.*, Nos. 99-2742, 00-1786, 99-2854, 00-1701, 2000 WL 1049185, at *2 (7th Cir. 2000).

Fourth, because *Travis* is correct and *Snapp* is mistaken, the conflict does not undermine the result in this case. As later illumination of the issue in the circuit courts will undoubtedly reveal, *Snapp* rests upon a misapplication of the doctrine of ejusdem generis. The Eleventh Circuit, focusing myopically on the language of section 216(b), reasoned that, because the remedies enumerated in that section ("employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages") were all compensa-tory in nature,[10] the general phrase "such legal or

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[9]Under California law, in a typical fraud case involving pecuniary injury "[e]motional distress is not recoverable as an element of damages." *Kruse v. Bank of America*, 202 Cal.App.3d 38, 67 (1988). And fraud plaintiffs usually may not recover their attorney's fees. Cal. Code Civ. Proc., § 1021.

[10]It is not obvious that the permissible remedy of "promotion" is necessarily compensatory.

equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3)" must be interpreted narrowly to exclude "legal . . . relief" which is not compensatory, such as punitive damages. 208 F.3d at pp. 933-934.

However, one of the recognized qualifications to the doctrine of ejusdem generis is that general words are not restricted in meaning to objects of the same kind if there is a clear manifestation of a contrary legislative intent. 2A Singer, Statutes and Statutory Construction (6th ed. 2000) § 47.22, pp. 297-304. As this Court well cautioned in *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 89 (1934):

> while the rule [of ejusdem generis] is a well-established and useful one, it is, like other canons of statutory construction, only an aid to the ascertainment of the true meaning of the statute. It is neither final nor exclusive. To ascertain the meaning of the words of a statute, they may be submitted to the test of all appropriate canons of statutory construction, of which the rule of ejusdem generis is only one. If, upon a consideration of the context and the objects sought to be attained and of the act as a whole, it adequately appears that the general words were not used in the restricted sense suggested by the rule, we must give effect to the conclusion afforded by the wider view in order that the will of the Legislature shall not fail.

Employer retaliation under section 215(a)(3) is a crime as well as a tort. Section 216(a) of Title 29 imposes criminal penalties—fines and imprisonment—for employer retaliation. Congress plainly intended that retaliation should have punitive consequences, i.e., consequences which serve the goals of

punishment and deterrence of the offender. By adopting section 216(a), Congress clearly revealed its intent that punishment of the wrongdoer is "appropriate to effectuate the purposes of section 215(a)(3)" (29 U.S.C. § 216(b)). The Eleventh Circuit's interpretation of section 216(b) to exclude punishment of the wrongdoer in the form of punitive damages is contrary to that manifest intent. If employer retaliation is viewed by Congress as an offense *to society* deserving of *criminal* punishment, Congress must have viewed such conduct as an offense *to the victim* deserving of *civil* punishment in the form of punitive damages.

In short, the conflict between *Travis* and *Snapp* is a tolerable conflict on an issue that requires "further study" in lower courts "before it is addressed by this court." *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.); Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 233 (1983) (articulating the Court's policy "of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question").

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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